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SUPREME COURT, U.S.

NO. 83 5106

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1983

EDWARD FIELDS,

Plaintiff-Petitioner,

vs.

DONALD W. WYRICK,
Warden, Missouri State Penitentiary,

Defendant-Respondent.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

and

PETITION FOR A WRIT OF CERTIORARI
FROM FINAL JUDGMENT ENTERED BY THE UNITED STATES
COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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Pursuant to Rule 45 of the Rules of this Court, Petitioner Edward Fields moves the Court for leave to proceed in forma pauperis and to file the attached Petition for Writ of Certiorari without payment of fees and costs, and in support thereof states as follows:

1. On May 23, 1983, the United States Court of Appeals for the Eighth Circuit affirmed a denial of Petitioner's Petition for Habeas Corpus Relief.

2. The said judgment is in error and in violation of the Constitution of the United States, all as more particularly appears from the Petition for Writ of Certiorari filed herewith.

3. Petitioner is unable to pay the costs and fees of this proceeding or to give security therefor.

4. Petitioner is represented by counsel appointed pursuant to the Criminal Justice Act of 1964, and thus no affidavit of poverty is required to be filed herewith under 18 U.S.C. Section 3006A(d)(6) and Rule 46.1 of the Rules of this Court.

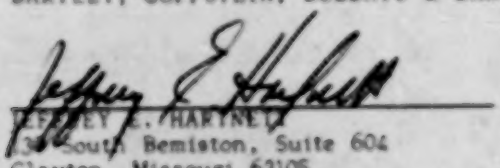
5. Leave to proceed in forma pauperis was sought by Petitioner and granted at the District Court level, and on appeal to the United States Court of Appeals for the Eighth Circuit. At that time, the Court of Appeals appointed counsel. Leave to proceed in forma pauperis was not thereafter sought in any court prior to the present motion.

WHEREFORE, Petitioner prays that he be allowed to proceed in forma pauperis and to file the attached Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit without prepayment of costs, and for such other relief as to the Court shall seem just.

Dated July 19th, 1983.

Respectfully submitted,

BARTLEY, GOFFSTEIN, BOLLATO & LANGE



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QUESTION PRESENTED

On September 25, 1974, Edward Fields was arrested, given his Miranda rights, and charged with rape. Fields was subsequently released on his own recognizance and retained counsel. More than two months later, Fields submitted to a polygraph examination at which his attorney was not present. Immediately prior to the polygraph, Fields was advised of his rights, and was told he could stop answering questions at any time or speak to his lawyer. He agreed to submit to the polygraph without presence of counsel. During the polygraph examination, one or more of Fields' answers indicated deceit. Following the examination, when the polygraph equipment had been detached, Fields was asked to explain the evidence of deceit. No Miranda warning was given at this time, and Fields proceeded to make a statement to the examiner which was later used against him at trial, leading to his conviction. The question presented in this Petition is whether Fields' right to counsel under the Sixth Amendment was violated when the government agents continued to interrogate him without counsel, beyond the polygraph examination to which he had agreed.

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NO. _____

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EDWARD FIELDS,

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PETITION FOR A WRIT OF CERTIORARI
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PETITION FOR WRIT OF CERTIORARI

Petitioner, Edward Fields, respectfully requests that a Writ of Certiorari issue to review the final order of the Eighth Circuit Court of Appeals in this case.

OPINIONS BELOW

This Petition arises as the culmination of a series of opinions which began when Fields sought a Writ of Habeas Corpus in Federal District Court. On February 13, 1981, Fields' Petition for Writ of Habeas Corpus was denied by United States District Court Judge Edward L. Filippine, United States District Court, Eastern District, Eastern Division of Missouri (Appendix D), for the reasons stated in the Report of United States Magistrate, William Jahn, which was issued December 16, 1980 (Appendix E). The District Court's denial was appealed to the Eighth Circuit Court of Appeals and reversed. Fields v. Wyrick, 682

F.2d 154 (8th Cir. 1982) (Appendix C). Following the denial of a petition for rehearing en banc (Appendix F), a Petition for Writ of Certiorari was granted. The Supreme Court of the United States reversed the Eighth Circuit Opinion based on the Fifth Amendment issue, and remanded the case to the Eighth Circuit for consideration of the Sixth Amendment issue. Wyrick v. Fields, 103 S.Ct. 394 (1982) (Appendix B). On remand to the Eighth Circuit, the trial Court's denial of Fields' Petition for Habeas Corpus was upheld in the case styled: Fields v. Wyrick, No. 81-1245 (8th Cir. 1983) (Appendix A). This Petition for Writ of Certiorari results from that Opinion.

JURISDICTIONAL STATEMENT

28 U.S.C. Section 1254(1) states that cases in the Courts of Appeals may be reviewed by this Court:

> By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree.

Title 28 U.S.C. Section 2101(c) states that:

> Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree . . . .

The Eighth Circuit's Order upholding the denial of Edward Fields' Petition for Writ of Habeas Corpus was issed on May 23, 1983. The Committee Comment to Rule 15 of the Eighth Circuit Rules of Appellate Procedure provides that:

> [a] petition for rehearing is not a prerequisite to the filing of a petition for writ of certiorari in the Supreme Court.

Therefore, the final judgment of the Eighth Circuit is properly sought to be reviewed by a request for writ of certiorari made within ninety days from May 23, 1983.

CONSTITUTIONAL PROVISION

United States Constitution, Sixth Amendment, reads as follows:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district where the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

STATEMENT OF CASE

Appellant Edward Fields, formerly a soldier stationed at Fort Leonard Wood, Missouri, was arrested and arraigned on September 21, 1974, for the alleged rape of a Waynesville, Missouri woman, and was released on his own recognizance. After his arrest, Fields retained private counsel. While on his own recognizance, he agreed to submit to a polygraph examination without presence of counsel. His counsel understood that the results of the polygraph were to be used merely to show deceit or non-deceit, for purposes of pre-trial negotiations.

Prior to the polygraph exam on December 4, 1974, Fields was given his Miranda rights. He signed a written consent form, and agreed to submit to the examination without presence of counsel. When the examination was completed, the examining government agent advised him that there was some deceit indicated by the polygraph, and asked him for an explanation. Fields then admitted to having consentual intercourse with the victim. The agent then asked Fields whether he wished to discuss the matter further with another agent and with the Waynesville Chief of Police. Fields agreed to do so, and after another Miranda warning, he repeated his statements.

On March 10, 1975, Fields was charged by information with rape. He filed a pre-trial motion to supress the testimony of the examining agent, the other government agent who heard his statement, and the Waynesville Chief of Police. That motion was de ied.

On the basis of the statements made af er the polygraph examination, Fields was convicted of rape by a jury. The conviction was affirmed on appeal. State v. Fields, 538 S.W.2d 348 (Mo.App. 1976). Motions for post-conviction relief were all denied. See Fields v. State of Missouri, 596 S.W.2d 776 (Mo.App. 1980); Fields v. State of Missouri, 572 S.W.2d 477 (Mo. 1978). Federal jurisdiction was invoked when Fields sought a writ of habeas corpus in Federal District Court.

REASONS FOR GRANTING THE WRIT

The Sixth Amendment right to counsel attaches at or after the initiation of adverse judicial proceedings, consisting of either a formal charge, preliminary hearing, indictment, information, or arraignment. Kirby v. Illinois, 406 U.S. 682 (1972). When criminal proceedings are initiated, the Defendant is most in need of the government's committment to assist him in the intricacies of criminal law.

Having been arraigned and released on his own recognizance at the time of the polygraph examination, Fields was within the scope of adversary judicial proceedings and was thereby entitled to the protection of the Sixth Amendment right to counsel. He exercised this right by obtaining private counsel. When his attorney advised him to take the polygraph examination to test for deceit or non-deceit, Fields agreed to do so. The attorney's advice was limited to testing for deceit or non-deceit; the attorney did not advise Fields to continue answering questions once the examination was completed. Thus, when Fields responded to the examiner's questions regarding the results of the polygraph test, he did so without advice of counsel.

The Fifth Amendment issue -- whether Fields had waived his right to remain silent -- was resolved against Fields by the Supreme Court in Wyrick v. Fields, 103 S.Ct. 394 (1982). However, the Sixth Amendment issue -- whether Fields also waived his Sixth Amendment right to counsel -- remained open for decision. Id. at 397.

The Fifth Amendment right may be waived without constituting a waiver of the Sixth Amendment right to counsel. Rhode Island v. Innis, 446 U.S. 291, 300 n. 4 (1980). Determination of the Sixth Amendment issue has a different focus than that of the Fifth. Where the Fifth Amendment is concerned, the ultimate question is whether the suspect made his statements voluntarily, thereby waiving his right to remain silent. Because of the inherent compulsion of a custodial interrogation, the Supreme Court has given the suspect the right to have counsel present to protect this Fifth Amendment right to remain silent. Miranda v. Arizona, 384 U.S. 436, 458 (1966). It was this Fifth Amendment right that was held to have been voluntarily waived in the prior Supreme Court Opinion in this case.

However, whether there has been a waiver of the Sixth Amendment right to counsel is determined differently. To carry its heavy burden of proof, the State must show more than mere voluntariness of the Defendant's statements. The State must prove that the Defendant intelligently, knowingly, and intentionally relinquished his right to have counsel present. Brewer v. Williams, 430 U.S. 387, 404 (1977). Where adverse judicial proceedings have been initiated, as here, the Sixth Amendment forbids all efforts by the State to deliberately elicit information without presence of counsel. United States v. Henry, 447 U.S. 264 at 273 n. 11 (1980); Massiah v. United States, 381 U.S. 356 (1965). "Deliberate elicitation" need not be in the form of coercion; actual intent to relinquish the right after a meaningfully timed Miranda warning must be established. Henry v. Dees, 658 F.2d 406 (5th Cir. 1981).

Defendant, under advice of his attorney, submitted to the polygraph examination and waived his Sixth Amendment right to counsel during the exam. However, he did not waive that right during the post exam interrogation.

Fields' counsel was of the understanding that the polygraph would only be used to show deceit or non-deceit, strictly for purposes of pre-trial negotiation. Yet, once deceit appeared on the polygraph and the examination was over, the examining officer initiated a conversation during which Fields admitted consensual sexual intercourse. No Sixth Amendment rights had been waived concerning this conversation.

Even had he been given his Miranda rights again, the answers he gave were still "deliberately elicited" by the State in violation of his rights as set out in Massiah v. United States, supra, and United States v. Henry, supra. The Supreme Court, by consistently excluding statements deliberately elicited in absence of counsel, has demonstrated a higher standard of protection for the accused than that accorded by the Fifth Amendment. Thus, the Court has recognized the significant role counsel plays after charges have been filed. See Note, Proposed Requirements for Waiver of the Sixth Amendment Right to Counsel; 82 Columbia Law Review 363 (1982).

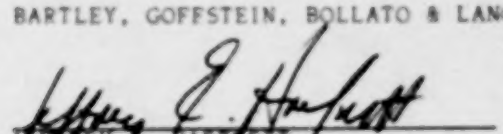
As a result of the examiner's deliberate elicitation of information after the conclusion of the polygraph examination, Fields' Sixth Amendment right to counsel was violated. This same information, later repeated to the police after Miranda warnings were given, is also inadmissible under the "cat-out-of-the-bag" doctrine. United States v. Bayer, 311 U.S. 532 (1947).

In summary, the statements made by Fields after the polygraph examination concluded should not have been admitted into evidence because the post-examination interrogation violated his Sixth Amendment right to counsel. Since Fields' conviction was based on these statements, certiorari should be granted in order to better delineate the standard

for waiver of the Sixth Amendment right to counsel, and because the Eighth Circuit Court of Appeals has decided this Sixth Amendment question in a manner which conflicts with prior Supreme Court decisions.

Respectfully submitted,

BARTLEY, GOFFSTEIN, BOLLATO & LANGE



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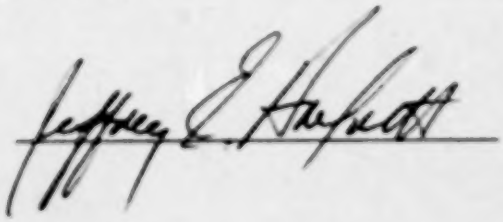
CERTIFICATE OF SERVICE

Copy of the foregoing Motion for Leave to Proceed In Forma Pauperis and Petition for a Writ of Certiorari From Final Judgment Entered by the United States Court of Appeals for the Eighth Circuit served on John Ashcroft, Attorney General, State of Missouri, P.O. Box 899, Jefferson City, Missouri 65102-0899 by placing same postage prepaid in the U. S. Mails this 19th day of July, 1983.



United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 81-1245

Edward Fields,

Appellant,

v.

Donald Wyrick,

Appellee.

Appeal from the United States District Court for the Eastern District of Missouri

Submitted: January 3, 1983

Filed: May 23, 1983

Before LAY, Chief Judge, HEANEY and ROSS, Circuit Judges.

ROSS, Circuit Judge.

This case is once again before the court for consideration of the issue of the admissibility of an inculpatory statement made by petitioner during post-polygraph test interrogation conducted in the absence of petitioner's counsel. For present purposes only a brief outline of the relevant factual and procedural history is necessary.[1]

[1]For a more thorough discussion of the facts and history of this case, see Fields v. Wyrick, 682 F.2d 154 (8th Cir.), rev'd per curiam, 103 S.Ct. 394 (1982).

Petitioner Edward Fields, then a soldier in the United States Army, was arrested on September 25, 1974, and charged with the rape of an eighty-one year old woman. At the time of his arrest he was advised of his rights under Miranda v. Arizona, 384 U.S. 436 (1966), including the right to have counsel present during any interrogation. Upon the advice of counsel, Fields requested a polygraph examination which was conducted on December 24, 1974. Fields' counsel was not present during the examination. Prior to administering the polygraph, a government agent gave Fields a written consent document, which Fields signed, informing him of his Miranda rights, and of his rights under the Uniform Code of Military Justice and the eighth amendment. In addition, the agent read to Fields a detailed statement of his rights, specifically advising him that he had the right to have an attorney present during the questioning and that: "If you are now going to discuss the offense under investigation, which is rape, with or without a lawyer present, you have a right to stop answering questions at any time or speak to a lawyer before answering further, even if you sign a waiver certificate." State v. Fields, 538 S.W.2d 348, 350 n.1 (Mo. Ct. App. 1976). When asked if he wanted a lawyer at that time, Fields responded, "No." Id.

After the polygraph examination was complete, the government agent advised Fields that the test indicated some deceit and asked him if he could explain why some of his answers were bothering him. Fields then admitted having consensual sexual intercourse with the woman on the day of the alleged rape. After being again advised of his Miranda rights, Fields repeated this confession to police officers.

On March 13, 1975, petitioner was convicted by a jury of rape. Fields' subsequent petition for a writ of habeas corpus under 28 U.S.C. § 2254 (1976), alleging, inter alia, that his conviction was based upon an involuntary confession, was denied by the district court. The majority of a panel of this court

reversed the district court on the grounds that evidence which was used to convict Fields was obtained in violation of his right under the fifth amendment to have counsel present at the interrogation. Fields v. Wyrick, 682 F.2d 154 (8th Cir. 1982). Specifically, the majority concluded that the government had failed to prove that Fields "knowingly and intelligently waived his right to have counsel present at the post-test interrogation." Id. at 160. The Supreme Court granted certiorari, reversed and remanded to this court. Wyrick v. Fields, 103 S.Ct. 394 (1982) (Per Curiam). On remand the Court apparently left open the issue of whether the post-polygraph interrogation violated petitioner's sixth amendment right to counsel. See id. at 397; id. at 400 (Marshall, J., dissenting).

Having granted petitioner's request to consider the sixth amendment issue, and having thoroughly reviewed the parties' briefs concerning this issue, we now hold that petitioner validly waived his sixth amendment right to have counsel present at the post-examination interrogation. Consequently, we conclude that Fields' incriminating statement was voluntary and was properly admitted at his trial.

We recognize that the fifth and sixth amendment rights to counsel may apply in different contexts and have different purposes. See, e.g., Edwards v. Arizona, 451 U.S. 477, 480 n.7 (1981); Rhode Island v. Innis, 446 U.S. 291, 300 n.4 (1980); United States v. Surridge, 687 F.2d 250, 253 (8th Cir.), cert. denied, 103 S.Ct. 465 (1982). We also acknowledge that in some circumstances a waiver of fifth amendment rights may not constitute a waiver of the sixth amendment right to counsel. Wyrick v. Fields, supra, 103 S.Ct. 400 (Marshall, J., dissenting). See, e.g., United States v. Mohabir, 624 F.2d 1140, 1147-48 (2d Cir. 1980). However, in the context of the instant case where the defendant had previously invoked his right to counsel, it is relatively clear that the validity of any subsequent waiver of either the fifth or sixth amendment right to

counsel is judged by essentially the same standard. To prove a waiver the government must show that under the particular facts and circumstances of the case there was a voluntary, knowing and intelligent abandonment or relinquishment of a known right or privilege.[2] See, e.g., Edwards v. Arizona, supra, 451 U.S. at 482 (fifth amendment right to counsel); Brewer v. Williams, 430 U.S. 387, 402 (1977) (sixth amendment right to counsel).

Petitioner, relying heavily on Brewer v. Williams, supra, argues that his sixth amendment right to counsel was violated when the interrogation at the polygraph examination went beyond the scope of an "agreement" between appellant's counsel and law enforcement officers to limit the examination to questions designed to reveal deceit. Petitioner maintains that any waiver of his right to counsel made prior to the polygraph examination must be viewed as limited to this portion of the examination, and that he did not waive his right to have counsel present during the post-test interrogation.[3] To substantiate his assertion

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[2]We note that this is apparently the standard employed by the Supreme Court in concluding that Fields had validly waived his fifth amendment right to have counsel present at the post-test interrogation. See Wyrick v. Fields, supra, 103 S.Ct. at 395-96.

[3]In Brewer v. Williams, 430 U.S. 387 (1977), the Court held that the defendant, Williams, had not waived his sixth amendment right to have counsel present during interrogation that occurred while the defendant was being transported by authorities. The Court's conclusion that the state had failed to "prove 'an intentional relinquishment or abandoment of a known right or privilege,'" substantially rested on the fact that an undisputed agreement existed between Williams' counsel and the authorities to the effect that no interrogation would take place during the trip, and that despite this fact the authorities deliberately elicited incriminating statements from Williams without advising him that he had a right to have a lawyer present and without any "effort at all to ascertain whether Williams wished to relinquish that right." Id. at 404-05. It is relevant to note that the Court did state that it was not holding "that under the circumstances of this case, Williams could not, without notice to counsel, have waived his rights under the Sixth and Fourteenth Amendments." Id. at 405-06 (footnote omitted).

concerning an agreement petitioner relies on a statement made by his counsel at the suppression hearing to the effect that it was counsel's and Fields' understanding that the request was only for a polygraph to be run to show deceit or nondeceit for purposes of pretrial negotiations. We cannot agree with petitioner that this statement supports the existence of any "agreement" limiting the scope of the interrogation, and we believe that petitioner's argument in this regard has already been rejected by the Supreme Court:

> The Court of Appeals stated that there was no indication that Fields or his lawyer anticipated that Fields would be asked questions after the examination. But it would have been unreasonable for Fields and his attorneys to assume that Fields would not be informed of the polygraph readings and asked to explain any unfavorable result. Moreover, Fields had been informed that he could stop the questioning at any time, and could request at any time that his lawyer join him. Merely disconnecting the polygraph equipment could not remove this knowledge from Fields' mind.

Wyrick v. Fields, supra, 103 S.Ct. at 396 (footnote omitted).

The record in this case discloses that Fields not only initiated a conversation with the authorities, but that "[b]y requesting a polygraph examination, he initiated interrogation." Wyrick v. Fields, supra, 103 S.Ct. at 396. Moreover, there is clear evidence that Fields was fully informed and understood[4] prior to the examination that he had a right to have counsel present at the interrogation, to stop answering questions and to speak to an attorney at any time, and that he expressly waived those rights prior to the interrogation. Under these particular facts and circumstances, we must conclude that petitioner voluntarily, intelligently, knowingly and intentionally relinquished his sixth amendment right to have counsel present at the post-test questioning. Accordingly, we

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[4]See Wyrick v. Fields, supra, 103 S.Ct. at 396; Fields v. Wyrick, supra, 682 F.2d at 162 (Ross, J., dissenting).

affirm the decision of the district court denying Fields' petition for habeas corpus relief.[5]

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

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[5]Fields has raised several other claims on his appeal from the denial of a writ of habeas corpus, including challenges based on ineffective assistance of counsel, improper jury selection, and lack of probable cause supporting the arrest warrant. After thorough consideration, we find these claims to be without merit.

APPENDIX D

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

DONALD W. WYRICK, WARDEN v. EDWARD FIELDS

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 82-158. Decided November 29, 1982

PER CURIAM.

In this case, the United States Court of Appeals for the Eighth Circuit, over a dissent by Judge Ross, directed that respondent Edward Fields' petition for a writ of habeas corpus be granted; it did so on the ground that Fields had been convicted with evidence obtained in violation of his Fifth Amendment right to have counsel present at an interrogation. 682 F. 2d 154 (1982). We have concluded that the Court of Appeals' majority misconstrued this Court's recent decision in *Edwards* v. *Arizona*, 451 U. S. 477 (1981), and imposed a new and unjustified limit on police questioning of a suspect who voluntarily, knowingly, and intelligently waives his right to have counsel present.

I

Respondent, a soldier then stationed at Fort Leonard Wood, Mo., was charged with raping an 81 year old woman on September 21, 1974. After his arrest on September 25, Fields was released on his own recognizance. He retained private defense counsel. After discussing the matter with his counsel and with a military attorney provided him by the Army, Fields requested a polygraph examination. This request was granted and the examination was conducted on December 4 by an agent of the Army's Criminal Investigation Division (CID) at the Fort.

Prior to undergoing the polygraph examination, Fields was given a written consent document, which he signed, inform-

ing him of his rights, as required by *Miranda* v. *Arizona*, 384 U. S. 436 (1966), and of his rights under the Uniform Code of Military Justice and the Eighth Amendment. In addition, the CID agent read to Fields the following detailed statement:

> "Before I ask you any questions, you must understand your rights. You do not have to answer my questions or say anything. Anything you say or do can be used against you in a criminal trial. You have a right to talk to a lawyer before questioning or have a lawyer present with you during the questioning. This lawyer can be a civilian lawyer of your own choice, or a military lawyer, detailed for you at no expense to you. Also, you may ask for a military lawyer of your choice by name and he will be detailed for you if superiors determine he's reasonably available. *If you are now going to discuss the offense under investigation, which is rape, with or without a lawyer present, you have a right to stop answering questions at any time or speak to a lawyer before answering further, even if you sign a waiver certificate.* Do you want a lawyer at this time?" See *State* v. *Fields*, 538 S.W. 2d 348, 350 n. 1 (Mo. App. 1976) (emphasis added).

Fields answered: "No."

At the conclusion of the polygraph examination, which took less than two hours, the CID agent told Fields that there had been some deceit, and asked him if he could explain why his answers were bothering him. Fields then admitted having intercourse with the victim on September 21, but said that she had instigated and consented to it. The agent asked Fields if he wished to discuss the matter further with another CID agent and with the Waynesville, Mo., Chief of Police. Fields said that he did. Then, in his turn, the police chief read Fields his *Miranda* warnings once again before questioning him. Fields repeated that he had had sexual contact with the victim, but that it had been consensual.

Respondent was tried before a jury in Circuit Court, Pu-

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laski County, Mo. He sought to suppress the testimony of the two CID agents and the police chief regarding his "confessions" to voluntary intercourse. The trial court denied the motion, ruling that Fields had waived his rights. The testimony was admitted. Fields was convicted, and was sentenced to 25 years in prison. The Missouri Court of Appeals affirmed the judgment on the ground that Fields "had been repeatedly and amply advised of his rights and . . . voluntarily, knowingly and intelligently waived his rights." 538 S.W. 2d, at 350.

Eventually, Fields sought a writ of habeas corpus in the United States District Court for the Eastern District of Missouri. The District Court, agreeing with the Missouri Court of Appeals that Fields had voluntarily, knowingly, and intelligently waived his right to counsel, denied respondent's petition. On appeal, however, the Eighth Circuit reversed and remanded the case with directions to order the State either to release Fields or to afford him a new trial. 682 F. 2d, at 162.

II

The Court of Appeals found that the police conduct in question contravened the "clear import" of this Court's decision in *Edwards* v. *Arizona*: "a defendant's right to have counsel present at custodial interrogations must be zealously guarded." 682 F. 2d, at 158. In *Edwards*, this Court had held that once a suspect invokes his right to counsel, he may not be subjected to further interrogation until counsel is provided unless the suspect himself initiates dialogue with the authorities. 451 U. S., at 484–487. The Eighth Circuit recognized that what it called the "per se rule" of *Edwards* "does not resolve the issue present here." 682 F. 2d, at 158. Fields and his counsel had agreed that Fields should take the polygraph examination, and Fields appeared voluntarily and stated that he did not want counsel present during the interrogation. Thus, the Court of Appeals conceded that "Fields thereby 'initiated' further dialogue with the authorities after his right to counsel had been invoked." *Ibid.*

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When the suspect has initiated the dialogue, *Edwards* makes clear that the right to have a lawyer present can be waived:

> "If, as frequently would occur in the course of a meeting initiated by the accused, the conversation is not wholly one-sided, it is likely that the officers will say or do something that clearly would be 'interrogation.' In that event, the question would be whether a valid waiver of the right to counsel and the right to silence had occurred, that is, whether the purported waiver was knowing and intelligent and found to be so under the totality of the circumstances, including the necessary fact that the accused, not the police, reopened the dialogue with the authorities." 451 U. S., at 486, n. 9.

Citing this language, the Eighth Circuit acknowledged—as it had to—that "[t]here is no question that Fields waived his right to have counsel present while the [polygraph] examination itself was being conducted." 682 F. 2d, at 160. Yet that court found that the State had failed to satisfy its burden of proving that "Fields knowingly and intelligently waived his right to have counsel present at the post-test interrogation." The court suggested that had the CID agent merely "paus[ed] to remind the defendant" of his rights, thus providing "*meaningfully timed Miranda* warnings" (emphasis in original), there would have been no violation. *Ibid.*

III

In reaching this result, the Court of Appeals did not examine the "totality of the circumstances," as *Edwards* requires. Fields did not merely initiate a "meeting." By requesting a polygraph examination, he initiated interrogation. That is, Fields waived not only his right to be free of contact with the authorities in the absence of an attorney, but also his right to be free of interrogation about the crime of which he was suspected. Fields validly waived his right to have counsel present at "post-test" questioning, unless the circumstances changed so seriously that his answers no longer were volun-

tary, or unless he no longer was making a "knowing and intelligent relinquishment or abandonment" of his rights. 451 U. S., at 482.

The Court of Appeals relied on two facts indicating the need for a new set of warnings: the polygraph examination had been discontinued, and Fields was asked if he could explain the test's unfavorable results. To require new warnings because of these two facts is unreasonable. Disconnecting the polygraph equipment effectuated no significant change in the character of the interrogation. The CID agent could have informed Fields during the examination that his answers indicated deceit; asking Fields, after the equipment was disconnected, why the answers were bothering him was not any more coercive. The Court of Appeals stated that there was no indication that Fields or his lawyer anticipated that Fields would be asked questions after the examination. But it would have been unreasonable for Fields and his attorneys to assume that Fields would not be informed of the polygraph readings and asked to explain any unfavorable result. Moreover, Fields had been informed that he could stop the questioning at any time, and could request at any time that his lawyer join him. Merely disconnecting the polygraph equipment could not remove this knowledge from Fields' mind.*

The only plausible explanation for the court's holding is that, encouraged by what it regarded as a *per se* rule established in *Edwards*, it fashioned another rule of its own: that, notwithstanding a voluntary, knowing, and intelligent waiver of the right to have counsel present at a polygraph examination, and notwithstanding clear evidence that the suspect understood that right and was aware of his power to stop ques-

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*The dissent suggests that, because the results of polygraph examinations are inadmissible in Missouri, Fields might reasonably have expected that he would not be subjected "to additional questioning that can produce admissible evidence." *Post*, at 2, n. 2. Although the results of the polygraph examination might not have been admissible evidence, the statements Fields made in response to questioning during the course of the polygraph examination surely would have been.

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tioning at any time or to speak to an attorney at any time, the police again must advise the suspect of his rights before questioning him at the same interrogation about the results of the polygraph. The court indicated that this rule was needed because it thought that the use of polygraph "results" in questioning, although it does not necessarily render a response involuntary, is inherently coercive. But Courts of Appeals, including a different panel of the Eighth Circuit itself, and state courts, have rejected such a rule. *See, e. g., United States* v. *Little Bear*, 583 F. 2d 411, 414 (CA8 1978), *Keiper* v. *Cupp*, 509 F. 2d 238, 241–242 (CA9 1975); *People* v. *Barreto*, 256 Cal. App. 2d 392, 64 Cal. Rptr. 211 (1967); *State* v. *Henry*, 352 So. 2d 643 (La. 1977). Cf. *Henry* v. *Dees*, 658 F. 2d 406 (CA5 1981) (waiver not voluntary, knowing, and intelligent in the total circumstances of the case, including mental retardation of suspect). The Eighth Circuit's rule certainly finds no support in *Edwards*, which emphasizes that the totality of the circumstances, including the fact that the suspect initiated the questioning, is controlling. Nor is the rule logical; the questions put to Fields after the examination would not have caused him to forget the rights of which he had been advised and which he had understood moments before. The rule is simply an unjustifiable restriction on reasonable police questioning.

IV

According to the dissent, a substantial question as to the admissibility of Fields' statements may be raised under the Sixth Amendment. *Post*, at 3–6. The Sixth Amendment issues raised by the dissent, however, are not before us. The Court of Appeals rested its judgment exclusively on the Fifth Amendment "right to have counsel present during a custodial interrogation" and on its interpretation of this Court's decision in *Edwards*. 682 F. 2d, at 158. That interpretation was flawed and the judgment of the Court of Appeals must be reversed. We express no view as to whether any constitutional safeguards not mentioned by the Court of Appeals bear on this case.

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Because the Court of Appeals misapplied *Edwards* and created an unjustified *per se* rule, the petition for a writ of certiorari is granted and that court's judgment is reversed and the case is remanded.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

DONALD W. WYRICK, WARDEN *v.* EDWARD FIELDS

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 82-158. Decided November 29, 1982

JUSTICE STEVENS, concurring.

There is much force to what JUSTICE MARSHALL has written in dissent. I share his concern about the Court's practice of deciding cases summarily, partly because there is a special risk of error in summary dispositions and partly because the practice represents an unwise use of the Court's scarce resources. I do not, however, agree with JUSTICE MARSHALL's suggestion that we should invite the parties to submit briefs on the merits before a case is summarily decided. I fear that the institution of such a practice would tend to regularize and expand the number of our summary dispositions.

In this case I believe the correct procedure for the Court to have followed would have been simply to deny the petition for a writ of certiorari. No conflict has yet developed on the precise question presented and, as JUSTICE MARSHALL demonstrates, the Court of Appeals' conclusion is not without reasoned support. The Court, however, has granted the petition. Although I voted against that action, I am now persuaded that the Court's resolution of the merits is correct and therefore join its disposition.

SUPREME COURT OF THE UNITED STATES

DONALD W. WYRICK, WARDEN v. EDWARD FIELDS

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 82-158. Decided November 29, 1982

JUSTICE MARSHALL, dissenting.

A summary reversal is an exceptional disposition. It should be reserved for situations in which the applicable law is settled and stable, the facts are not disputed, and the decision below is clearly in error.[1] Because I do not believe that this is such a case, I dissent.

I

I do not agree that respondent's consent to the polygraph examination necessarily constituted a waiver of his Fifth Amendment rights with respect to the post-examination interrogation. In my view, this case is not controlled by the footnote in *Edwards* v. *Arizona*, 451 U. S. 477, 486 n. 9 (1981), on which the Court relies. That footnote dealt with the hypothetical case, not before the Court in *Edwards*, of a suspect who initiates a meeting with the police. The Court indicated that, even if the police said or did something in the meeting that constituted interrogation, incriminating statements thereby elicited would be admissible if a knowing and intelligent waiver of the suspect's Fifth Amendment rights could be inferred in light of "*the totality of the circumstances*, including the necessary fact that the accused, not the police, reopened the dialogue with the authorities." *Ibid.* (Emphasis supplied.)

In this case, "the totality of the circumstances" includes the undisputed facts that respondent agreed only to submit

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[1] See generally Brown, Foreword: Process of Law, 72 Harv. L. Rev. 77 (1958).

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to a polygraph examination, and that he was never told he would be subjected to a post-examination interrogation. Moreover, an agreement to submit to a polygraph examination differs in an important respect from the initiation of an ordinary conversation with the authorities. When a suspect commences a conversation with a policeman, he has reason to expect that, as in any conversation, there will be a give-and-take extending beyond the subject matter of his original remarks. It may therefore be appropriate to conclude that the suspect's waiver of his Fifth Amendment rights extends to the entire conversation. By contrast, a polygraph examination is a discrete test. It has a readily identifiable beginning and end. An individual who submits to such an examination does not necessarily have any reason whatsoever to expect that he will be subjected to a post-examination interrogation.[1] While in some cases the prosecution may be able to prove that a suspect knew there would be questioning after the test, here there is "no evidence that Fields or his lawyer anticipated that the CID officer would attempt to elicit incriminating statements from Fields after the examination was run." 682 F. 2d 154, 160 (CA8 1982).

In any event, I do not believe that this substantial constitutional question should be disposed of summarily. I recognize, of course, that this Court's expanding docket has increased the pressure to accelerate the disposition process. I cannot agree, however, that summary reversal is proper in a case that involves a significant issue not settled by our prior

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[1] Certainly no one would argue that a suspect who consented to a blood test, a lineup, or fingerprinting thereby consented to be questioned about the results of those procedures.

In this case, it is particularly inappropriate to assume that Fields must have realized that the the CID agent would conduct a post-examination interrogation. The results of polygraph examinations are inadmissible in Missouri. *See State* v. *Biddle*, 599 S. W. 2d 182, 191 (Mo. 1980) (en banc); *State* v. *Weindorf*, 361 S. W. 2d 806, 811 (Mo. 1962). When a defendant, after consultation with his attorney, agrees to submit to an examination the results of which are inadmissible, the authorities have no justification for inferring that the defendant has also agreed to submit to additional questioning that can produce admissible evidence.

decisions. If the Court concludes that there are "special and important reasons," Sup. Ct. Rule 17.1, for granting certiorari but also concludes that this case should not be set for oral argument, the Court should at least give the parties notice that it is considering a summary disposition, so that they may have an opportunity to submit briefs on the *merits*. See Brown, Foreword: Process of Law, 72 Harv. L. Rev. 77, 94–96 (1958).

II

Today's decision holds only that the post-examination interrogation did not violate respondent's Fifth Amendment privilege against self-incrimination. The Court's ruling does not preclude the Court of Appeals from considering on remand whether the interrogation nevertheless violated his Sixth Amendment right to counsel.[1] See *Massiah* v. *United States*, 377 U. S. 201 (1964). Because "the policies underlying the two constitutional protections are quite distinct,"

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[1] I do not share the majority's certainty that the Court of Appeals relied "exclusively on the Fifth Amendment." *Ante*, at 6. Although the opinion below does discuss *Edwards* v. *Arizona*, 451 U. S. 477 (1981), at considerable length, the court phrased its holding in terms of the "right to counsel" without referring specifically to the Fifth Amendment or the Sixth Amendment. See 682 F. 2d, at 157 ("we conclude that Fields did not knowingly and intelligently waive his right to have counsel present at the interrogation"); id., at 161 ("The government has simply introduced no evidence from which we can conclude that when Fields was confronted with the accusatory statement that the 'lie-detector' showed he was lying, he waived his right to the protection of counsel in this coercive situation."). See also id., at 161 n. 12 (relying on *Brewer* v. *Williams*, 430 U. S. 387 (1977), a Sixth Amendment case). It is noteworthy that the Magistrate, whose report the District Court adopted, pointed to the Sixth Amendment problem by observing that it is "a somewhat empty gesture to appoint an attorney for an accused . . . and then pursue an interrogation . . . without his attorney." In addition, the petition for certiorari asserts that the decision below "expands the rights guaranteed an accused during interrogation under the Fifth *and Sixth Amendments*." Petition for Certiorari at 7 (emphasis supplied).

In any event, since the Court today construes the Court of Appeals' opinion as resting solely on the Fifth Amendment, the Sixth Amendment issue remains open on remand.

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Rhode Island v. *Innis*, 446 U. S. 291, 300 n. 4 (1980), a suspect may waive his Fifth Amendment right to remain silent without waiving his Sixth Amendment right to counsel.

Where only the Fifth Amendment applies, the ultimate question is whether the conduct alleged to constitute a waiver demonstrates that, despite "the compulsion inherent in custodial surroundings," *Miranda* v. *Arizona*, 384 U. S. 436, 458 (1966), the suspect's statements were given voluntarily. To make the Fifth Amendment protection against compelled self-incrimination effective, this Court has held that a suspect has a right to have counsel present at any custodial interrogation. *Id.*, at 469–472. Once a suspect in custody asks to speak to a lawyer, he "is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police." *Edwards* v. *Arizona*, 451 U. S. 477, 484–485 (1981). When a suspect has indicated that he needs legal advice before deciding whether to talk further, any subsequent statements made at the authorities' insistence without counsel being present are unlikely to be voluntary. See *Michigan* v. *Mosley*, 423 U. S. 96, 110 n. 2 (1975) (WHITE, J., concurring in the result). If, on the other hand, the subsequent statements are made in a conversation initiated by the accused, they may well be voluntary. See *Edwards* v. *Arizona*, 451 U. S., at 486 n. 9. Since the underlying purpose of the privilege against self-incrimination is to prevent the State from coercing an individual to give evidence against himself, it makes sense to find a waiver of the privilege where a suspect's conduct provides assurance that his statements were made voluntarily.

The determination of whether there has been a valid waiver of the Sixth Amendment right to counsel has a different focus, for the values underlying that right are different. The purpose of the Sixth Amendment right to counsel is to provide the defendant with legal assistance during the critical stages of the criminal process. See, *e. g.*, *Brewer* v. *Williams*, 430 U. S. 387, 398 (1977); *Powell* v. *Alabama*, 287

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U. S. 45, 57 (1982). To give effect to this protection, this Court has insisted that the State deal with a defendant through his attorney. Once the State has commenced adversary criminal proceedings against an individual, as Missouri did in this case more than two months before the polygraph examination was held, the Sixth Amendment forbids *all* efforts to elicit information from him in the absence of counsel, regardless of whether he is in custody, see *United States* v. *Henry*, 447 U. S. 264, 273–274 n. 11 (1980); *Massiah* v. *United States*, *supra*, and regardless of whether the technique used to extract information is in any way coercive, see *McLeod* v. *Ohio*, 381 U. S. 356 (1965).

To establish a waiver of the Sixth Amendment right to counsel, it is therefore not enough for the State to point to conduct—such as the initiation of a conversation—that demonstrates that the defendant's statements were made voluntarily. Since a Sixth Amendment violation does not depend upon coercion, the protection of the Sixth Amendment is not waived by conduct that shows only that a defendant's statements were not coerced. The State must show that the defendant intelligently and knowingly relinquished his right not to be questioned in the absence of counsel. The State can establish a waiver only by proving "'an intentional relinquishment or abandonment'" of the right to have counsel present. *Brewer* v. *Williams*, *supra*, 430 U. S., at 404, quoting *Johnson* v. *Zerbst*, 304 U. S. 458, 464 (1938).[*]

Given the different policies underlying the Fifth and Sixth Amendments, it is not surprising that a number of courts have held that "'[w]arnings by law enforcement officers and subsequent action by the accused that might suffice to comply with Fifth Amendment strictures against testimonial

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[*] *Edwards* v. *Arizona*, 451 U. S. 477 (1981), addressed only the standard governing waiver of the Fifth Amendment privilege against self-incrimination. Since the Court concluded that Edwards had been interrogated in violation of the Fifth Amendment, it had no occasion to consider whether the Sixth Amendment applied or whether, if so, Edwards had waived its protection. See *id.*, at 480 n. 7.

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compulsion [do] not necessarily meet . . . the higher standard with respect to waiver of the right to counsel that applies when the Sixth Amendment right to counsel has attached.'" *United States* v. *Mohabir*, 624 F. 2d 1140, 1147 (CA2 1980), quoting *United* v. *Massimo*, 432 F. 2d 324, 327 (CA2 1970) (Friendly, J., dissenting) (majority did not reach the issue), cert. denied, 400 U. S. 1022 (1971).[1] Today's decision therefore does not foreclose the Court of Appeals from considering on remand whether the post-examination interrogation violated the Sixth Amendment.

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[1] See *United States ex rel. O'Connor* v. *New Jersey*, 405 F. 2d 622, 626 (CA7), cert. denied, 396 U. S. 923 (1969); *Hancock* v. *White*, 378 F. 2d 479, 482 (CA1 1967). See also *United States* v. *Springer*, 460 F. 2d 1344, 1354–1355 (CA7) (STEVENS, J., dissenting), cert. denied, 409 U. S. 873 (1972); *People* v. *Arthur*, 22 N. Y. 2d 325, 239 N. E. 2d 537, 539 (1968). See generally Note, 82 Colum. L. Rev. 363 (1982).

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APPENDIX ~~A~~ C

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

NO. 81-1245

EDWARD FIELDS, *Appellant*, v. DONALD WYRICK, *Appellee*	Appeal from the United States District Court for the Eastern District of Missouri.

Submitted: September 17, 1981

Filed: April 23, 1982

Before LAY, Chief Judge, and HEANEY and ROSS, Circuit Judges.

HEANEY, Circuit Judge.

Edward Fields appeals from the district court's denial of his petition for habeas corpus relief filed pursuant to 28 U.S.C. § 2254. We reverse the lower court on the ground that Fields' state court conviction was obtained as a result of his involuntary confession. Federal habeas corpus relief, therefore, should have been granted.

Fields, a soldier then stationed at Fort Leonard Wood, was charged with raping a Waynesville, Missouri woman on September 21, 1974. He was convicted by a jury on

March 13, 1975, and was sentenced to twenty-five years imprisonment. His conviction was affirmed on appeal. *State v. Fields*, 538 S.W.2d 348 (Mo. Ct. App. 1976).

Fields subsequently filed three successive motions to set aside his conviction under Rule 27.26 of the Missouri Rules of Criminal Procedure. These motions were denied. *Fields v. State of Missouri*, 586 S.W.2d 776 (Mo. Ct. App. 1980); *Fields v. State of Missouri*, 572 S.W.2d 477 (Mo. 1978). Fields then sought a writ of habeas corpus, citing various grounds allegedly justifying relief. Only one of these asserted errors concerns us on appeal, *i.e.*, Fields' contention that the trial court erroneously admitted testimony regarding his "involuntary confession."

Our recitation of the circumstances leading up to Fields' confession relies primarily on facts either stipulated to by the parties at the suppression hearing or as set out in the court's opinion affirming Fields' conviction on direct appeal. Fields was arrested on September 25, 1974, and charged with rape. He was released on his own recognizance and retained private defense counsel. After discussing the matter with his counsel and a military attorney, Fields consented to the administration of a polygraph examination in connection with the rape charge. The examination was conducted on December 4, 1974, by Jesse Meel Bourne, Jr., an agent with the United States Army Criminal Investigation Division (CID) at Fort Leonard Wood. Although an attorney is allowed to be present during a CID polygraph examination, Fields' coun-

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Fields also claims that he was denied effective assistance of counsel at his trial, on direct appeal, and in perfecting his 27.26 motions, that the warrant used in his arrest lacked probable cause, and that the lineup which consisted him was unfair in that it was racially unbalanced women and blacks. Because we agree that Fields' confession was involuntary, we need not reach the other issues raised in his habeas petition.

sel was not invited to be present, nor was he informed that the test would be given that day. Before the polygraph examination was given, Fields was advised that he had the right to remain silent and to have an attorney present, and he signed a written form consenting to the examination.

After the examination was completed, Bourne told Fields that there "had been some deceit" and asked him if he had some explanation as to why his answers were bothering him. Fields thereupon stated that he had had intercourse with the victim on September 21, 1974, but that she had instigated and consented to the contact. Bourne then asked Fields if he wished to discuss the matter further with another CID agent, Charles Fann, and the Waynesville Chief of Police, James Cole. Fields agreed to do so. Police Chief Cole gave Fields the *Miranda* warnings before questioning him. Fields repeated to Cole and Agent Fann his account of what happened on September 21, *i.e.*, that the victim had voluntarily engaged in sexual relations with him at her residence.

Fields sought to suppress the testimony of Police Chief Cole and Agents Bourne and Fann regarding his "confession" to voluntary intercourse. On the day of Fields' trial, a hearing was held on Fields' motion, at the conclusion of which the trial court stated the following:

> Well, I'm going to overrule the Motion to Suppress for the reason that this defendant on several occasions was advised what his rights were.
>
> It's true that he was represented by counsel and he talked to counsel about it. And while I'm inclined to believe that we ought to make every effort to protect the rights of individuals, grant them their constitutional rights, still, after the defendant is advised not on one occasion, but on several occasions, what

> his rights are, then he voluntarily requests and puts himself in position for making statements which—with the understanding that they might be used against him, I think that in this case that he waived these rights and I would have to overrule the Motion to Suppress.

The trial court did not enter written findings of fact or conclusions of law on the motion to suppress.

The propriety of this ruling was the sole issue raised in Fields' direct appeal of his conviction. The Missouri Court of Appeals stated that Fields' pleadings or briefs did not preserve anything for appellate review, but went on to "briefly" consider Fields' constitutional claim under a "plain error" standard. *State v. Fields*, *supra*, 578 S.W.2d at 349-350. The court concluded that the motion to suppress was properly denied because "defendant had been repeatedly and amply advised of his rights [and] voluntarily, knowingly and intelligently waived his rights." *Id.* at 350.

We are mindful of the Supreme Court's recent admonition that in federal habeas corpus proceedings the court must apply a "presumption of correctness" to factual determinations made by the state courts. *See Sumner v. Mata*, 66 L.Ed.2d 722, 731 (1981). The applicable statute provides that this "presumption of correctness" applies to a state court's "determination after a hearing on the merits of a factual issue * * * evidenced by a written finding, written opinion, or other reliable and adequate written indicia." 28 U.S.C. § 2254(d). The presumption does not, of course, attach to a state court's resolution of a question of federal law or to "a mixed determination of law and fact that requires the application of legal principles to the historical facts of [a] case." *Cuyler v. Sulli-*

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case, 446 U.S. 233, 242 (1980).[3] As the Supreme Court has noted, the question of whether or not a defendant has effectively waived his constitutional rights is not one of fact but of federal law. *See Brewer v. Williams*, 430 U.S. 387, 397 n.4 (1977). Accordingly, we have accepted the "basic, primary or historical facts"[4] determined by the state courts,[5] while independently reviewing the legal conclusion drawn therefrom.

After a careful review of the record and the state court's findings, we conclude that Fields did not knowingly and intelligently waive his right to have counsel present at the interrogation described above. Fields' incriminat-

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[3] The dissent in *Sumner v. Mata*, 69 L.Ed.2d 722 (1981), seems to suggest that the majority has eroded this principle by holding that the Sumner appeals court had not complied with § 2254(d) even though its ruling at issue was a disagreement with the state court "over the constitutional significance of the facts of the case, and not over the facts themselves." *Sumner v. Mata*, *supra*, 69 L.Ed.2d at 737. We are not persuaded by this argument. Even if it appears that a court from its holdings (i.e., that a federal court considering a habeas petition can overturn the factual findings of a state trial or appellate court only if, in the process granting the writ, the court clearly states why it considers any of the eight "exceptions" to § 2254(d) "presumption of correctness" to be applicable. *Id.* at 734, the majority explicitly asserted that "even a state's factual judge may overturn the judgment of the highest court of a state insofar as it deals with the application of the United States Constitution or laws to the facts in question." *Id.* at 729.

[4] *Cuyler v. Sullivan*, 446 U.S. 335, 342 (1980).

[5] As we have noted, the trial court did *not* enter evidentiary findings and the appellate court merely provided a brief explication of some of the circumstances leading up to Fields' confession. Because we find that so much of the appeals court's version of the relevant events is inconsistent with our conclusion that the confession was involuntary, we need not reach the issue of whether section 2254(d)'s strictures apply to that court's brief, "plain error" review of Fields' claim. *Cf. Sumner v. Mata*, *supra*, 69 L.Ed.2d at 730 (§ 2254(d) applies to state appellate court findings made after plenary consideration of petitioners' claim, including review of state court record).

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ing statements were, therefore, not voluntarily made and should have been suppressed.*

It has been clear since *Miranda v. Arizona*, 384 U.S. 436 (1966), that "the right to have counsel present at [an] interrogation is indispensable to the protection of the Fifth Amendment privilege" against self-incrimination. *Id.* at 469. This aspect of the *Miranda* ruling reflects the Court's concern that "the circumstances surrounding in-custody interrogation can operate very quickly to overbear the will of one merely made aware of his privilege by his interrogators." *Id.*

The importance of the right to have counsel present during a custodial interrogation has recently received renewed emphasis. In *Edwards v. Arizona*, 68 L.Ed.2d 378 (1981), the Supreme Court held that once a suspect invokes his right to counsel, he is not subject to further interrogation until counsel is provided to him, unless the suspect himself initiates dialogue with the authorities. In so ruling, the Court apparently sought to buttress the right to counsel by creating a *per se* rule restricting the circumstances under which a court can find that the right has been waived. *See* Note, *Edwards v. Arizona: The Burger Court Breathes New Life Into Miranda*, 69 Cal. L. Rev. 1734, 1746-1747 (1981). Objective criteria control the waiver determination when a suspect has invoked the right to counsel: either counsel must be present at subsequent custodial interrogations or else the dialogue at issue must have been initiated by the accused.

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*There is no question that Fields' "confession" was material to his conviction because, if believed, it definitively established that Fields had intercourse with the victim on the day of the rape. The rape victim never saw her assailant, except for his hand, because her face was covered by a pillowcase throughout the assault. When asked at trial if the defendant's hand was the one she saw that day, the victim replied "no."

The per se rule enunciated in *Edwards* does not resolve the issue present here. Fields and his counsel mutually agreed that Fields should take the polygraph examination. Fields appeared at the examination without his counsel and stated that he did not want counsel present during the examination. Fields thereby "initiated" further dialogue with the authorities after his right to counsel had been invoked. Accordingly, the question of whether Fields waived his right to have his counsel present at the subsequent interrogation becomes more complex. The *Edwards* Court stated that

> if [Edwards] in the course of a meeting initiated by the accused, the conversation is not wholly one-sided [and] the officers [do not] say or do something that [they] would [to] "interrogation" [then] the question would be whether [Edwards'] the purported waiver was knowing and intelligent and found to be so under the totality of the circumstances, including the necessary fact that the accused, not the police, reopened the dialogue with the authorities.

Edwards v. Arizona, *supra*, 68 L.Ed.2d at 387 n.9.[*] The burden of proving that a defendant has knowingly and voluntarily waived his right to have counsel present at an interrogation rests with the government, and the Supreme Court has characterized that burden as a "heavy" one. *See Miranda v. Arizona*, *supra*, 384 U.S. at 475.

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[*] The fact that Fields "initiated" the meeting with the authorities does not render the resulting interrogation "non-custodial," as the state seems to suggest; it merely changes the standard by which the existence vel non of a waiver is determined. Nor was the interrogation "non-custodial" simply because Fields was not in jail at the time the polygraph was run. Fields had been arrested on the rape charge, and was released on his own recognizance only under the condition that his company commander know where he was at all times.

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Regardless of whether the *Edwards* per se rule is strictly applicable, the clear import of the *Edwards* decision is to affirm that a defendant's right to have counsel present at custodial interrogations must be zealously guarded, particularly when the defendant has retained counsel and thereby has expressed a desire to deal with the authorities through counsel. We cannot find that the government proved a knowing and intelligent waiver in this case without significantly undermining that principle.

In any event, the right to have counsel present is especially crucial where, as here, the authorities utilize the "results" of a polygraph examination to elicit incriminating statements from the accused. It has been suggested that the [illegible] utility of polygraphs administered in the course of a criminal investigation is [illegible] See Lykken, *A Tremor in the Blood: Uses and Abuses of the Lie Detector*, 214-215 (1981).[*] This Circuit has refused to admit the results of unstipulated polygraph examinations into evidence because the polygraph does not command scientific acceptability and is not generally believed to be sufficiently reliable to ascertaining truth and deception to justify its utilization in the trial process." *United States v. Alexander*, 526 F.2d 161, 164 (8th Cir. 1975). *Accord, United States v. Ware*, 547 F.2d 922, 926 (5th Cir.), *cert. denied*, 434 U.S. 905 (1977); *United States v. Skeens*, 494 F.2d 1050, 1053 (D.C. Cir. 1974). *See DeHart v. Weld Sheriff*, 650 F.2d 708, 713 (3rd Cir. 1980); *United States v. Rose*, 527 F.2d 1051, 1058-1059 (10th Cir.), *cert. denied*, 426 U.S. 906 (1976). The Missouri state courts refuse to allow any

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[*] Professor Lykken cites, for example, the experience of the Los Angeles Police Department polygraph laboratory. There examiners estimate that [illegible] confessions from [illegible] percent of the suspects submitted to polygraph tests. Lykken, *A Tremor in the Blood: Uses and Abuses of the Lie Detector*, 208 (1981).

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polygraph examination results into evidence at trial, even if the parties have stipulated to the use of such evidence. *See State v. Biddle*, 599 S.W.2d 182, 191 (Mo. 1980) (*en banc*); *State v. Weindorf*, 361 S.W.2d 806, 811 (Mo. 1962). The Missouri Supreme Court recently stated that

> [g]iven the large margin of error stated by some experts and the disagreements among the experts as to the polygraph's reliability, a stipulation as to the admissibility of its results is, in effect, an agreement to rely upon chance rather than upon competent evidence, as well as an agreement regarding scientific opinion beyond the competence of either party to understand or evaluate.

State v. Biddle, *supra*, 599 S.W.2d at 190 n.10.

The questionable reliability of so-called "lie-detectors"[*] does not, however, diminish the significant psychological impact the device can have on the examinee. *See* Lykken, *supra*, at 211-212. It may seem futile to maintain silence in the face of the examiner's statement that the machine, cloaked with the mystique of scientific infallibility, has shown the accused to be lying. Furthermore, the examiner is not likely to be challenged by the accused when he indicates that the machine has shown "some deceit:" the accused, and frequently the court reviewing the

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[*] As this Court noted in *United States v. Alexander*, 526 F.2d 161, 165 (8th Cir. 1975),

> [t]here is no "lie detector." The polygraph machine is not a "lie detector," nor does the operator who interprets the graph detect "lies." The machine records physical responses which may or may not be connected with an emotional reaction and that reaction may or may not be related to guilt or innocence.

quoting, H.R. Rep. No. 198, 89th Cong., 1st Sess. 13 (1965). *See* Lykken, *supra*, at 33-62.

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circumstances of a polygraph-induced confession, has no way of knowing what, in fact, the test results revealed.[9]

We do not, of course, imply that the use of a polygraph and its "results" is the kind of "trickery" that necessarily renders post-test confessions involuntary. We merely hold that because of the significant potential for abuse inherent in a post-polygraph interrogation, the courts must be particularly cautious about finding that a suspect has "waived" his right to have counsel present at such an interrogation.

There is no question that Fields waived his right to have counsel present while the examination itself was being conducted. Fields was advised that he did not have to answer any of the examiner's questions and that he could have an attorney present at the examination. Prior to the beginning of the polygraph examination, Fields stated that he did not want a lawyer present and signed a written consent to the examination. This fact is not sufficient to meet the government's burden to prove that Fields knowingly and intelligently waived his right to have counsel present at the post-test interrogation.

The line we draw is not an artificial one. In *Henry v. Dees*, 658 F.2d 406 (5th Cir. 1981), the Fifth Circuit held that the defendant's waiver of his constitutional right to remain silent and have counsel present during a polygraph examination did not extend to questions propounded by the examiner after the defendant was "off" the polygraph machine. The defendant, Gilbert Henry, with his counsel present, had signed written consent forms waiving his constitutional safeguards for the duration of the polygraph examination and stipulating to the admissibility of any statements of guilt procured by the examiner during the

[9] That was the case here; the results of Fields' polygraph examination were not part of the record before the district court or on appeal.

examination. The examiner, administering the examination without defendant's counsel that he had "failed" and asked did he "want to tell me about the thing?" The court concluded that the inculpatory statements made by the defendant in response to that inquiry were not, under the totality of the circumstances, freely and voluntarily made and, therefore, should have been suppressed. *Id.* at 408-409.

In refusing to extend Henry's examination consent to the post-test questioning, the Fifth Circuit noted that "[n]either Henry nor his counsel contemplated that the instruments they signed exposed Henry to questioning which was not an integral part of a polygraph examination." *Id.* at 410. There is similarly no evidence that Fields or his lawyer anticipated that the CID officer would attempt to elicit incriminating statements from Fields after the examination was run. Fields' lawyer stated at the suppression hearing that he and the defendant only wanted a "polygraph to be run and that we be given results." It was his understanding that "the running of the polygraph would have merely shown deceit or non-deceit and would have been used for the purposes of a possible pretrial negotiation."[*] Agent Bourne, the polygraph examiner, did not attempt to dispel this mistaken impression before the examination began. Bourne testified that he did not inform Fields that if the machine indicated that his responses were deceitful that Bourne would continue the questioning "to find the truth." Nonetheless, Fields "was subjected to interrogation of a[n] [investigative] officer, out of the presence of his counsel, and without the benefit of *meaningfully timed* Miranda warnings."

[*] Fields consented to the polygraph examination because it was his and his commanding officers' hope that a "successful" polygraph examination of Fields would encourage the authorities to drop the charges against Fields so that he could graduate and transfer out with the rest of his basic training class.

Id. (emphasis added). "The [officer] moved from administration of a polygraph examination to police interrogation without pausing to remind [the defendant] of his privilege against self-incrimination and his right to have counsel present during questioning." *Id.* at 409.[11] As a result, the officer obtained highly incriminating admissible testimony from the defendant, instead of merely determining the results of the polygraph examination—results which could not have been introduced at Fields' trial. *See State v. Biddle, supra*, 599 S.W.2d at 191; *State v. Windorf, supra*, 561 S.W.2d at 811.

Because we hold that Fields' consent to the polygraph did not constitute a waiver of his right to have counsel present at the *post*-test interrogation,[12] we then must in-

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[11] In response to questioning by the state's attorney, Bourne testified:

Q. After the polygraph examination was done, did you have any further conversation with this man?

A. Yes sir.

* * * *

Q. Did you indicate to him that he did not have to make any further statements other than what he had already done on the polygraph examination?

A. No sir, we continued to discuss it.

[12] The Missouri Court of Appeals, in its opinion affirming Fields' conviction, erroneously considered Fields' consent to the polygraph to be persuasive evidence of knowing and intelligent consent to the post-test interrogation. The court bolstered its consent finding by stating that Fields testified that before the test began he was read his rights and "I understood it to be that I didn't have to make any statements, do anything without my counsel being present." The transcript reveals, however, that Fields *in fact stated that at the time of his arrest*, he understood that he did not have to make any statements before he retained counsel and had him or her present. As the Supreme Court has noted, "waiver requires not merely comprehension but relinquishment." *Brewer v. Williams*, 430 U.S. 387, 404 (1977). *Miranda* warnings successfully imparted to Fields *at the time of* his arrest no more constitute conclusive evidence of a post-polygraph waiver than does the fact that Fields waived his right to protection of counsel during the examination.

quire whether he subsequently waived this right." The government has simply introduced no evidence from which we can conclude that when Fields was confronted with the accusatory statement that the "lie-detector" showed he was lying, he waived his right to the protection of counsel in this coercive situation.

After Fields "confessed" to Agent Bourne, he was requestioned by Police Chief Cole and CID Officer Fann. This questioning was preceded by *Miranda* warnings. These warnings, however, could hardly be considered "meaningfully timed." Fields had already told Bourne his version of the events of September 21, 1974, a story that was merely repeated to the other officers. Cole's and Fann's testimony at trial regarding the substance of Fields' "confession" was cumulative. Therefore, even if we were to

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[illegible] our view, neither the *Henry v. Dees* decision, nor ours in the instant case, is inconsistent with this Court's opinion in *United States v. Little Bear*, 383 F.2d 411 (8th Cir. 1978). Little Bear, under investigation for the manslaughter of her husband, agreed to take a polygraph examination. Before the examination began, she signed a written consent form. She therein stated that she was consenting to an interview with the FBI, *a part of which* was to be the polygraph. The examiner attached the apparatus to Little Bear, and asked her if she had stabbed her husband. She responded in the affirmative and said she wanted to talk about it. The polygraph was removed and Little Bear confessed. The Court held that the confession was voluntarily made.

A number of factors distinguish *Little Bear* from the situation present here. Of primary importance is the fact that Little Bear had not retained counsel when she went to take the polygraph. Accordingly, the Court was not required to determine whether the agents' procedure had deprived Little Bear of a previously asserted right to deal with the authorities through counsel.

Furthermore, Little Bear expressly consented to an interview that was not confined to questions propounded as part of the polygraph examination. There was no question then of whether the examiner had improperly exceeded the scope of what Little Bear had consented to. Finally, and relatedly, Little Bear's "confession" was prompted by the examiner's first and only question propounded while she was on the machine. She was not subjected to "post-test" interrogation prompted by alleged deceitful responses.

consider the belated warnings to be sufficient evidence that Fields voluntarily, knowingly and intelligently waived his right to have counsel present, the warnings—and the alleged waiver—simply came too late.

We note that the troublesome circumstances of this case could have been easily avoided. If the polygraph did, in fact, detect physiological responses by Fields that the examiner associated with deceitful testimony, it would have been a simple matter for him to contact Fields' counsel before proceeding to interrogate the defendant. This action, of course, was not constitutionally commanded. But it would have prevented the situation we are presented with here—a defendant, in the absence of his retained counsel, giving key inculpatory testimony to an investigative officer, without any indication in the record that he knowingly and intelligently waived his right to have his counsel present.

For the reasons set forth above, we remand to the district court with directions to it to order the state to either release the appellant or afford him a new trial. The district court shall fix a reasonable time period within which the state must provide this relief.

ROSS, Circuit Judge, Dissenting.

I am compelled to dissent from the majority's conclusion that the appellant's confession during the post-polygraph test interview was involuntarily given because "Fields did not knowingly and intelligently waive his right to have counsel present" at that interrogation. It is well established "that waivers of counsel must not only be voluntary, but constitute a knowing and intelligent relinquishment or abandonment of a known right or privilege, a matter which depends in each case 'upon the particular facts and circumstances and conduct of the accused.'" *Edwards v. Arizona*, 101 S.Ct. 1880, 1882-84 (1981), *quoting*

Johnson v. Zerbst, 304 U.S. 458, 464 (1938). However, accepting the basic facts presented in the majority opinion, it seems clear that Fields must be viewed as having waived his rights to have counsel present at the interrogation in accordance with this standard.

On September 25, 1974, when Fields was arrested and charged with the rape he was given his *Miranda* warnings. He admitted in his suppression hearing that he understood the meaning of these rights when he stated that "I understand it to be that I didn't have to make any statements, do anything without my counsel present." Fields thereupon consulted with both privately retained and military counsel, and consented to a polygraph examination. Prior to undergoing the polygraph on December 4, 1974, Fields was again fully advised of his rights. He was given and signed a written consent document which informed him of his rights under the Uniform Code of Military Justice and the Eighth Amendment. In addition, the agent read the defendant the following detailed statement of his "rights":

> "Before I ask you any questions, you must understand your rights. *You do not have to answer my questions or say anything. Anything you say or do can be used as evidence against you in a criminal trial. You have a right to talk to a lawyer before questioning or have a lawyer present with you during the questioning.* This lawyer can be a civilian lawyer of your own choice, or a military lawyer, detailed for you at no expense to you. Also, you may ask for a military lawyer of your choice by name and he will be detailed for you if superiors determine he's reasonably available. *If you are now going to discuss the offense under investigation, which is rape, with or without a lawyer present, you have a right to stop answering questions at any time or speak to a lawyer before answering further, even*

if you sign a waiver certificate. Do you want a lawyer at this time?" Defendant answered, "No."

State v. Fields, 538 S.W.2d 348, 350 n.1 (Mo. Ct. App. 1976) (emphasis added). It is important to note that Fields was clearly advised that he could stop answering questions *at any time* or speak to a lawyer *even if he signed the waiver certificate*. After Fields had made his confession to consensual sexual intercourse with the victim to Agent Bourne, he was again given his *Miranda* warnings before he repeated his confession to the police.

Thus, it is clear that Fields was given full warnings concerning his rights at least twice before he made his confession to Agent Bourne. Furthermore, there is absolutely no indication that Fields did not fully comprehend those rights and the consequences of any statement that he made. To the contrary, Fields' admission that he understood what his *Miranda* rights meant, even if made in reference to post-arrest warnings, strongly supports the conclusion that Fields still understood what those rights meant when he was advised of them again prior to the polygraph, especially in light of the fact that Fields had been advised by counsel prior to taking the polygraph. There is simply nothing in the stated facts which would cast doubt as to Fields' continuing comprehension of his rights at the time he took the examination. Moreover, although the majority opinion notes that Fields' waiver of *Miranda* rights immediately after his confession to Agent Bourne but prior to his repeated confession to the police are not timely as to that first confession, Fields' continuing waiver of those rights is at least indicative of his continued comprehension and desire to waive those rights.

If continued waiver of counsel after numerous clear warnings is not sufficient to show voluntary, knowing and intelligent waiver, I am somewhat perplexed as to what

would be sufficient in the circumstances of this case. As I read the majority's opinion, only two things would have made the confession voluntary: (1) the presence of Fields' counsel at the polygraph, or (2) giving Fields another set of *Miranda* warnings after the polygraph had been turned off but before any further questioning. As the court notes in its opinion, contacting Fields' counsel, in the absence of a request by Fields to do so, is not constitutionally required. Furthermore, it is difficult to understand, in the circumstances of this case, how one more recitation of *Miranda* warnings would prove knowing and intelligent waiver if waiver of two prior sets of warnings, one of which was given minutes before, does not.

Moreover, I cannot agree that the line drawn between the interrogation undertaken during which the polygraph was attached and the questioning following the polygraph is not an artificial and hypertechnical one. The substance of the entire transaction was interrogation to which Fields clearly consented as indicated by his waiver. Although the results of the polygraph could not be used against Fields under Missouri law, it is not clear that any admission made by Fields during the course of that examination would also be inadmissible. There is substantial support for the rule that the mere fact that a confession was made in anticipation of, during, or following a polygraph examination does not render the confession involuntary and inadmissible. *See* 89 A.L.R.3d 230, 236 (1979), and cases cited therein.

I do not believe that *Henry v. Dees*, 658 F.2d 406 (5th Cir. 1981) supports the requirement of additional *Miranda* warnings after the polygraph examination but before further interrogation. As noted by that court, the question is whether a waiver can be viewed as voluntary, knowing, and intelligent in the total circumstances of a case. However, the factual circumstances in *Dees* are clearly distinguishable from those in the present case. It seems apparent

upon reading the *Dees* opinion that the court's conclusion that the confession obtained was involuntary rested very heavily on the fact that the defendant in the case was mentally retarded. *Id.* at 411. Moreover, unlike the waiver and consent to a polygraph which was signed in the instant case where Fields could at any time during the examination stop the questioning and request counsel, the waiver in *Dees* precluded the presence of the defendant's counsel at the polygraph. *Id.* at 408. This factor was also critical in the court's determination that the initial waiver was not valid when the examiner shifted from the polygraph to a general interrogation. *See id.* at 409-10. Finally, it must be noted that the lie detector examination upon which the examiner based his statement that the defendant had failed the examination was never completed. *Id.* at 410. The Fifth Circuit clearly noted the relevance of such a hint of deception by the police in obtaining a confession. *Id.* In the instant case there is no evidence of any mental subnormality on the part of Fields; it is clear that Fields had a right to the presence of counsel during all phases of the examination and knew he did; and there is no evidence that the *completed* polygraph examination was used as a ruse to interrogate Fields outside the presence of his counsel.

In addition to the fact that I believe that *Henry v. Dees* does not support the majority's conclusion, I cannot agree that the majority's opinion is not inconsistent with this court's decision in *United States v. Little Bear*, 583 F.2d 411 (8th Cir. 1978) (Lay, Bright and Ross). In *Little Bear* the defendant was questioned by BIA agents concerning her husband's death the previous night. She was advised of her rights and signed a waiver form. Two months later she was again questioned, this time by an FBI agent who decided to give Little Bear a polygraph examination. Prior to taking the polygraph she was given a "Consent to be

Interviewed with Polygraph" form which she signed. She was also advised by the agent of her constitutional rights and she signed that form's waiver provision. During the polygraph examination Little Bear was asked if she stabbed her husband. She responded in the affirmative and said she wanted to talk about it. At this point she was not reminded of her right to an attorney or to remain silent. Upon further interrogation, Little Bear signed a written confession. On appeal, Little Bear contended that the confession should have been suppressed because it was not voluntarily given under the circumstances. This court held that Little Bear had voluntarily confessed.

The factors upon which the majority distinguishes *Little Bear* are not convincing. First, the fact that Little Bear had not retained counsel seems to be of little relevance to the instant case, since Fields, although retaining counsel, had not asserted his right to deal with the authorities through counsel. If anything, the absence of counsel in *Little Bear* would seem to require a closer scrutiny of the voluntariness of the confession. Secondly, there is nothing to indicate that this court's holding in *Little Bear* even remotely turned on the fact that the polygraph form which the defendant signed might be construed to consent to a broader interview than just a polygraph. In fact, the court, in arriving at the conclusion that Little Bear's confession was voluntary, knowing, and intelligent, relied explicitly on the reasoning of the Ninth Circuit in *Keiper v. Cupp*, 509 F.2d 238 (9th Cir. 1975), which is factually very similar to the instant case. In rejecting Keiper's habeas claim that he should have been given an additional *Miranda* warning after the polygraph, but before interrogation resulting in a confession the Ninth Circuit stated Keiper "had been advised many times of his rights prior to, and at the time of the polygraph test, there is no reason to believe that he

was not fully aware of those rights during the crucial period when his final story was taped." 509 F.2d at 238.

Similarly, in the dispositive passage of *Little Bear* this court stated:

> This case somewhat parallels *Keiper* in that Ms. Little Bear also signed a waiver of rights form before a polygraph examination, indicated at some subsequent point that she wanted to offer a statement, and later claimed her statement was made involuntarily. Additionally, in the instant case, as in *Keiper*, the district court found Ms. Little Bear had voluntarily confessed and knowingly and intelligently waived her rights even though no second, post-polygraph *Miranda* warning was given.

United States v. Little Bear, 583 F.2d at 414. The reasoning expressed in *Keiper* and *Little Bear* appears to be generally followed. *See People v. Barreto*, 256 Cal. App. 2d 202, 64 Cal. Rptr. 211 (1967); *State v. Henry*, 332 So.2d 643 (La. 1977); *Turner v. State*, 250 N.W.2d 706 (Wis. 1977).

In summary, *Little Bear* and the apparent weight of authority would seem to support a holding that under the totality of the circumstances, Fields' waiver and confession was voluntary, knowing, and intelligent when he was clearly advised of his rights on numerous occasions prior to his confession. This seems especially true in light of the fact that this court found a voluntary, knowing and intelligent waiver and confession in *Little Bear*, a case involving an unsophisticated, unounseled, and emotionally distraught Indian woman. Finally, I would note that I can find nothing in *Edwards v. Arizona*, *supra*, a case clearly distinguishable from the instant case on its facts and the legal principles involved, which dictates the result reached in the majority's opinion in this case.

For the foregoing reasons, I would affirm the district court's denial of the appellant's petition for habeas corpus relief.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX ~~B~~ D

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF MISSOURI

EASTERN DIVISION

EDWARD FIELDS, *Petitioner,* v. DONALD WYRICK, Warden, *Respondent.*	**No. 80-1113 C (3)**

ORDER

This matter is before the Court on the petition of Edward Fields for a writ of habeas corpus. After consideration of the Review and Recommendation of the United States Magistrate and petitioner's exceptions thereto,

IT IS HEREBY ORDERED that the Review and Recommendation of the United States Magistrate be and is SUSTAINED and ADOPTED and that the petition of Edward Fields for a writ of habeas corpus be and is DISMISSED without further judicial proceeding.

Dated this 13th day of February, 1981.

Edward L. Filippine
UNITED STATES DISTRICT JUDGE

APPENDIX E

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF MISSOURI

EASTERN DIVISION

EDWARD FIELDS, *Petitioner,* v. DONALD WYRICK, Warden, *Respondent.*	No. 80-1113C(3)

MAGISTRATE'S REVIEW AND RECOMMENDATION

Edward Fields has filed a petition for federal habeas corpus from the custody of Donald Wyrick, at the Missouri State Penitentiary. Fields was convicted in Pulaski County, Missouri on March 13, 1975, of rape and sentenced to twenty-five years. His conviction was affirmed at *State v. Fields*, 538 S.W.2d 348 (Mo. Ct. App. Spr. Dist. 1976).

Fields has raised some six grounds charging constitutional right denial, which he claims entitles him to federal habeas:

(1) He received ineffective assistance of counsel in perfecting his 27.26 motion.

(2) The warrant causing his arrest lacked probable cause.

(3) His trial jury was selected by systematically excluding women and blacks.

(4) His counsel was ineffective in attacking his confession.

(5) He was denied effective assistance of counsel on appeal.

(6) Trial counsel was ineffective in failing to investigate and interview one Don Butler, a codefendant.

At the outset, considering petitioner's Ground No. 1, we do not feel that this presents a constitutional question. Title 28 United States Code, §2254 gives the district court authority to review a state court conviction, but not collateral proceedings, which are civil in nature and beyond the aura of the Fifth Amendment. *United States ex. rel. Curtis v. People of State of Illinois*, 521 F.2d 717 (7th Cir. 1975), *cert. denied sub. nom., Curtis v. Illinois*, 423 U.S. 1023 (1976); *Bay v. United States*, 428 F.2d 1193 (8th Cir. 1970); *Baker v. United States*, 334 F.2d 444 (8th Cir. 1964).

Concerning Fiebl's contention that the warrant for his arrest lacked probable cause determination, respondent urges that this claim not be considered because it has not been previously presented to the state courts. By failing to present this issue to the state court, Fields has failed to exhaust his available state remedies, and the record so indicates. *Picard v. Connor*, 404 U.S. 270 (1971). Further, we might note that even if exhaustion was conceded, *arguendo*, illegal arrest does not void a subsequent conviction. *Gerstein v. Pugh*, 420 U.S. 103 (1975). Present detention or arrest might be the proper subject for habeas corpus challenge, but a conviction will not be vacated on a defective arrest ground. *Id.*

Concerning Fields' allegation in this third claim, that he was denied due process and equal protection of the law in that his jury systematically excluded women and blacks, respondent again contends that this claim has not been exhausted in the state courts. A review of the record verifies respondent's contention. Further, we note that

challenges to the jury selection system must be made at the first opportunity or when such facts are shown. *Francis v. Henderson*, 425 U.S. 536 (1976); *Wainwright v. Sykes*, 433 U.S. 72 (1977); *Picard v. Connor*, *supra*.

Fields' allegations four and five challenge the assistance of his counsel. Specifically, Fields' claims that his trial counsel failed to challenge the "unconstitutional obtaining of the confession" and that trial counsel did not properly perfect his appeal. As to the confession, Fields' sole point of appeal was that the trial court erred in overruling his motion to suppress said confession. The confession in question was taken by the Criminal Investigation Division (CID) of the United States Army after defendant had been appointed counsel, but without said counsel being present.

This Court has carefully considered the points raised by petitioner in his quest for federal habeas and existing case law requires that same be denied. However, it is somewhat disturbing to review the circumstances under which Fields' confession was obtained. He had been appointed counsel. Apparently, the CID and the defendant agreed upon a polygraph. They solicited and obtained the necessary waivers to comply with *Miranda v. Arizona*, 384 U.S. 436 (1966). When the polygraph showed some irregularity, they called in the local law enforcement people, who pursued the interrogation. Fields' attorney was not invited nor present for this continued interrogation. It seems a somewhat empty gesture to appoint an attorney for an accused with one hand, and then pursue interrogation of the accused without his attorney under the guise of knowing waiver with the other.

Chief Justice Berger, when a circuit judge in *Mathies v. United States*, 374 F.2d 312 (D.C. 1967), indicated that his feeling was that *Miranda v. Arizona*, *supra*, would re-

quire the presence of counsel at all interviews once an accused was represented. However, this view has not been unanimously accepted.

We agree with some reservation that it is logical that an interrogated defendant can waive presence of counsel either before or after appointment, but after appointment it would seem that the burden of the proof of said waiver should be a heavy one. The awesome force and strength of the CID of the Army, is common knowledge. A simple soldier surrounded by this array of military officers, who were subsequently joined by the state police in their interrogation, is in a difficult position to knowingly and voluntarily waive his right to have counsel present.

This soldier was convicted of raping an eighty-one year old woman, who could not identify him because a pillow case had been placed over her head during the attack. Also, she was unable to identify his hands which she did see during the attack. His confession, which conceded voluntary intercourse, was critical to his conviction. The woman claimed to have been raped four times and one other soldier, Don Butler, admitted participation in the affair. The method used by the Army and the sheriff in obtaining Fields' confession are borderline. They do find support in *Moore* and *McConnell*, *supra*. *McConnell* presented a confession obtained after a flunked polygraph test, not unlike Fields. However, in *McConnell*, the appointed attorney, although not present at the confession, had given his telephonic approval of the polygraph examination.

It is true that the court of appeals did make some uncomplimentary observations concerning the appeal brief; they considered the point regardless, to ascertain if plain error was committed. The Missouri Court of Appeals found

that the defendant had voluntarily, knowingly and intelligently waived his right to counsel prior to the taking of the confession. *State v. Fields, supra*, at p. 350. The court further found that the defendant had been repeatedly and amply advised of his rights and that he voluntarily, knowingly and intelligently waived these rights.

> "If an accused can voluntarily, knowingly and intelligently waive his right to counsel before one has been appointed (or employed), there seems no compelling reason to hold that he may not voluntarily, knowingly and intelligently waive his right to have counsel present at an interrogation after counsel has been appointed (or employed)." *Moore v. Wolff*, 495 F.2d 35 (8th Cir. 1974); *State v. McConnell*, 529 S.W.2d 185 (Mo.App. 1975).

Fields' sixth claim is another allegation concerning ineffective assistance of counsel in failing to call one Don Butler, who was a co-defendant, as a defense witness. At his third 27.26* hearing, his trial attorney testified that he was familiar with Fields' co-defendant, Don Butler. He further testified that Butler was represented by another attorney, who would not allow him to testify in any stage of the proceedings that Fields was involved in (Respondent's Exhibit G-P89). In view of his obvious effort to follow the directions of Fields in using Butler as a defense witness, his trial attorney could hardly be called ineffective.

> "In this circuit, the evaluation of a petition alleging ineffective assistance of counsel involves a

Fields v. State, 572 S.W.2d 477 (S.C.Mo. 1978), is a landmark case which decided that in all 27.26 motions, there shall be appointed counsel. Fields had appealed his prior 27.26 motion ruling because of his statement that he "didn't know or understand what could be raised on a 27.26 motion."

two-step process. *Rinehart v. Brewer*, 561 F.2d 126 (8th Cir. 1977). The petitioner must first show that his attorney failed to exercise the customary skills and diligence that a reasonable competent attorney would exercise under similar circumstances. *United States v. Easter*, 539 F.2d 663, 666 (8th Cir. 1976), *cert. denied*, 434 U.S. 844 (1977). Second, the petitioner must demonstrate that he was materially prejudiced in the defense of his case by the actions or inactions of his counsel. *Nevels v. Parratt*, 596 F.2d 344 (8th Cir. 1979); *Marcum v. Parratt*, 574 F.2d 411 (8th Cir. 1978); *Rinehart v. Brewer*, *supra*.

Therefore, it is the conclusion and recommendation of the reviewing Magistrate that Edward Fields' application for federal habeas corpus be denied without further proceedings.

The parties are hereby advised that they have ten days from the service of this recommendation within which to file objections to same, pursuant to 28 U.S.C. §636(b).

William S. Dabe
UNITED STATES MAGISTRATE

Dated: December 16, 1980

APPENDIX D F

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

SEPTEMBER TERM, 1981

No. 81-1245

EDWARD FIELDS, *Appellant,* vs. DONALD WYRICK, *Appellee.*	Appeal from the United States District Court for the Eastern District of Missouri.

The Court, having considered Appellee's petition for rehearing and suggestions for rehearing en banc and being now fully advised in the premises, hereby orders the petition for rehearing and suggestions for rehearing en banc denied. Judges Ross, Henley and John Gibson voted to grant the petition for rehearing en banc.

May 28, 1982

cert

Attorney General of Missouri

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JOHN ASHCROFT
ATTORNEY GENERAL

(314) 751-3321
DIRECT DIAL:

October 25, 1983

RECEIVED
OCT 28 1983
OFFICE OF THE CLERK
SUPREME COURT, U.S.

Alexander L. Stevas, Clerk
Office of the Clerk
Supreme Court of the United States
Washington, D.C. 20543

Re: Edward Fields vs. Donald W. Wyrick,
No. 83-5106

Dear Mr. Stevas:

On September 27, 1983, I received a letter from you indicating that the Court requested that I file a response to Fields' petition for writ of certiorari in the above-referenced case. In this regard I have perused the petition which requests that a writ of certiorari be issued to the Eighth Circuit to review its opinion, written by Judge Ross; I have also reviewed the Eighth Circuit opinion thoroughly.

The issues presented by Fields in his petition are substantially identical to those raised in the Eighth Circuit, and which were discussed at length and found wanting by the Eighth Circuit. I believe that the petition of Fields does not raise substantive legal issues, but rather disputes the factual conclusions made by the Eighth Circuit. I believe the Eighth Circuit opinion to be quintessentially clear, cogent, legally correct, and fully substantiated by the record.

In attempting to prepare the response requested by the Court in this case I continually found myself referring to the Eighth Circuit opinion written by Judge Ross. As I looked over my response to the petition of Fields, I found that it remarkably resembled the opinion of the Eighth Circuit at issue here. Consequently, I do not believe that I can add anything of substance to what the Eighth Circuit, by Judge Ross, has stated in this matter; therefore, I respectfully request that the Court review the petition of Fields based on the documents

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presently before it. I understand that the Court has requested a response from me, and I do not come to my conclusion lightly that I have little if anything to add in support of the opinion of the Eighth Circuit; however, the circumstances of the instant case indicate to me that the Eighth Circuit opinion is so well written and legally supported that it can stand on its own merits.

I hope I have not misconstrued or misinterpreted your letter anent the instant case, and I further hope that this letter may be construed as my response to the petition of Fields, wherein I rely on the Eighth Circuit opinon to establish why the petition ought to be denied.

Sincerely,

JOHN ASHCROFT
Attorney General

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